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No. 04-1377

IN THE

Supreme Court of the United States

DOUGLAS N. PEARSON,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, in view of this Court's decisions in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), *Blakely v. Washington*, 124 S.Ct. 2531 (2004) and *United States v. Booker/Fanfan*, 125 S.Ct. 738 (2005), the trial court committed reversible error and violated petitioner's Sixth Amendment constitutional right to have any factual findings relative to sentencing enhancements made under a "beyond a reasonable doubt" standard and that they be made to a jury?

2. Whether the Supreme Court's *Booker/Fanfan* decision constitutes a watershed rule of criminal procedure, so as to require its retroactive application to petitioner?

3. Whether the trial court committed reversible error and violated petitioner's Sixth Amendment constitutional right to have a jury make any factual findings relative to sentencing enhancements under a "beyond a reasonable doubt" standard when it denied petitioner's timely *Apprendi* application at the time of his sentencing?

PARTIES

The names of all parties to the proceeding in the court whose judgment is sought to be reviewed here appear in the caption of the case.

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OPINIONS AND ORDERS BELOW

The judgment of conviction as to petitioner Douglas N. Pearson was issued at sentencing on December 20, 2002, originally filed on December 23, 2002 in the Southern District of Illinois, and later modified by amended final judgment filed on January 21, 2003 and reprinted in the Appendix ("App.") at 33a-48a.

The decision of the Circuit Court of Appeals for the Seventh Circuit affirming the District Court was entered on August 14, 2003, is published as *United States v. Pearson*, 340 F.3d 459 (7th Cir. 2003), and is reprinted at App. 7a-25a.

The Memorandum and Order of the District Court, dismissing, without prejudice, Pearson's Motion for Post-Conviction Relief Seeking Vacatur of Sentence Or, In the Alternative, A Reduction of Sentence pursuant to 28 U.S.C. § 2255, was entered on August 19, 2004, and is reprinted at App. 29a-32a.

The Memorandum and Order of the District Court, granting Pearson's motion for a certificate of appealability in conjunction with his appeal of the District Court's denial of his 2255 petition, was entered on October 12, 2004, and is reprinted at App. 26a-28a.

The Order of the Seventh Circuit Court of Appeals, vacating the certificate of appealability and affirming the District Court judgment denying Pearson's 2255 petition, was entered on February 8, 2005, and is reprinted at App. 1a-2a.

JURISDICTION

The Order of the Seventh Circuit Court of Appeals, vacating the certificate of appealability and affirming the District Court judgment denying Pearson's 2255 peti-

tion, was entered on February 8, 2005. This Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the United States Constitution provides in pertinent part that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; . . . ."

STATEMENT OF CASE

A. Statement of Facts

On December 20, 2002, following his two-count conviction for conspiracy to commit wire fraud and wire fraud, appellant Pearson appeared before the trial judge for sentencing. App. 48a-49a. Pearson's sentence was calculated using the United States Sentencing Guidelines ("USSG"). App. 54a. The court evaluated the sentence based "upon the total amount of aggregate harm or loss pursuant to Guidelines Section 3D1.2(d)." App. 54a. As a result of enhancements made by the court, Pearson's Offense Level was elevated from a base level of 6 to an Offense Level of 26, an increase of 20 levels. App. 54a-55a. The court's sentencing enhancements consisted of: (1) an increase of 12 levels for a finding of loss falling within the range of $1.5 million and $2.5 million; (2) an increase of 2 levels based on the court's finding of "more than minimal planning" on the part of Defendant; (3) an increase of 2 levels based on the "mass market-

ing" and advertising campaign attendant to the conduct; (4) an increase of 2 levels based on Defendant's role as "an organizer, leader, manager or supervisor in [the] conspiracy;" and (5) an increase in 2 levels based on Defendant's "abuse of his position of public and private trust." App. 54a-55a. In total, Pearson's sentence was increased from a statutory maximum of 12 months to 64 months, a total increase of at least 52 months. App. 56a.

The facts that formed the bases for these upward enhancements were made by the court based on a "preponderance of the evidence" standard. App. 52a. They were never decided beyond a reasonable doubt or decided by a jury at all. App. 52a. Pearson's counsel explicitly raised an *Apprendi* objection to the court's enhancement methodology (App. 50a-51a), but the court rejected the objection, stating:

> [W]hile I appreciate the invitation to lead the way in the Seventh Circuit on a different burden of proof in this matter, I'll decline that invitation and let somebody else take the lead on establishing the burden of beyond a reasonable doubt on these matters, let some more wiser and bolder judge take that lead. So far as I can tell the Seventh Circuit is not doing that, and from the case law that I've read, I don't see an inclination at this point to do that, and I think that at this point the burden is still one of a preponderance, and will remain a preponderance in this Court until the Seventh Circuit tells me different. Maybe they'll do that in this case, but they'll have to do that for me.

App. 52a.

B. Proceedings Below

On June 20, 2002, following a four-month jury trial, appellant Pearson was convicted of Conspiracy to Commit Wire Fraud under 18 U.S.C. § 371 (Count I) and Wire Fraud under 18 U.S.C. § 1343 (Count II). At a hearing held on December 20, 2002, Pearson was sentenced by the trial court to a prison term of 64 months, consisting of two separate sentences of 32 months for each count, running consecutively. Pearson was also sentenced to two years of supervised release upon completion of the 64-month sentence and ordered to pay a fine in the amount of $150,000 (allocated as $100,000 for Count I and $50,000 for Count II). App. 56a.

On January 2, 2003, Pearson surrendered to the United States Marshal of the Southern District of Illinois to begin his sentence. Appellant has since served approximately 27 months at a federal correctional facility. App. 37a.

On August 14, 2003, the Court of Appeals for the Seventh Circuit denied Pearson's appeal. App. 7a-25a.

On or about July 13, 2004, based upon the Supreme Court decision in *Blakely v. Washington* and the Seventh Circuit's subsequent ruling in *U.S. v. Booker*, Pearson filed a Motion For Post-Conviction Relief Seeking Vacatur of Sentence Or, In the Alternative, A Reduction Of Sentence pursuant to 28 U.S.C. § 2255. App. 65a. By Memorandum and Order dated August 19, 2004, the trial court dismissed, without prejudice, the habeas corpus petition based upon the Seventh Circuit's ruling that "[t]he Supreme Court has not made the Blakely rule applicable to cases on collateral review. . . ." App. 29a-32a.

On or about October 6, 2004, Pearson filed a motion for a certificate of appealability in conjunction with his

appeal of the trial court's denial of his 2255 petition. App. 67a. By Memorandum and Order dated October 12, 2004, the court granted the motion, finding that "Pearson has made a substantial showing of a denial of a constitutional right." App. 26a-28a. On October 7, 2004, Pearson filed his notice of appeal. App. 67a.

On November 8, 2004, Pearson filed his brief and appendix in support of the appeal of his §2255 petition to vacate, set aside or correct his December 2002 sentence, insofar as the trial court enhanced the sentence based upon factual findings not determined by a jury and not assessed under a "reasonable doubt" standard in violation of the Sixth Amendment. App. 61a. That same day, November 8, 2004, Pearson contemporaneously filed with the Seventh Circuit a motion for bail pending this appeal. App. 61a.

By Order dated November 17, 2004, the Seventh Circuit denied Pearson's application for bail. App. 3a-4a. That same day, by Order also dated November 17, 2004, the Seventh Circuit stayed the proceedings pending the Supreme Court's decision in *United States v. Booker*, No. 04-104, and *United States v. Fanfan*, No. 04-105. The Order additionally directed the parties to file statements of position within 14 days after the Supreme Court opinion issued. App. 5a-6a.

On January 12, 2005, the Supreme Court issued its opinion in *United States v. Booker/Fanfan*, 125 S.Ct. 738 (2005). On January 25, 2005, Pearson filed and served his statement of position in accordance with the Seventh Circuit's directive. App. 62a.

On or about January 28, 2005, following the Seventh Circuit's deadline to file statements of position, the Government filed a motion for an extension of time to file its position statement. App. 62a.

By Order dated February 8, 2005, the Seventh Circuit, in light of its opinion in *McReynolds v. United States*, 2005 WL 237642 (7th Cir. February 2, 2005), vacated Pearson's certificate of appealability and affirmed the district court judgment denying Pearson's 2255 petition. App. 1a-2a.

REASONS FOR GRANTING THE WRIT

I. The *Booker/Fanfan* Decision Must Be Applied Retroactively in This Case, As Pearson Raised a Timely *Apprendi* Objection at His Sentencing

The Supreme Court does not explicitly address the issue of retroactive application of its *United States v. Booker/Fanfan* decision,[1] stating only:

> [W]e must apply today's holdings—both the Sixth Amendment holding and our remedial interpretation of the Sentencing Act—to all cases on direct review. See *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987)('[A] new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases . . . pending on direct review or not yet final, with no exception for cases in which the new rule

[1] Neither the *Booker* or *Fanfan* appeals, as here, were the consequence of federal *habeas corpus* petitions or based on other forms of collateral review, so it is not altogether unexpected that the Court did not address an issue not before it. "[T]he Court's announcement of a constitutional rule in the realm of criminal procedure has frequently been followed by a separate decision explaining whether, and to what extent, that rule applies to past, pending, and future cases." *United States v. Johnson*, 457 U.S. 537, 542 (1982). Indeed, given that Justice Ginsburg is the only member of the Court to comprise the majority in both the "Sixth Amendment" and "remedial" opinions authored by Justices Stevens and Breyer, respectively, there is no absolutely reliable means of discerning how the Court would apply the *Booker/Fanfan* holding to a federal *habeas* appeal.

> constitutes a 'clear break' with the past').[2] . . . Nor do we believe that every appeal will lead to a new sentencing hearing. That is because we expect reviewing courts to apply ordinary prudential doctrines, determining, for example, ***whether the issue was raised below*** . . . .

Slip Opinion, at 12 (Breyer, J.)(emphasis added). Yet the very fact that defendant Pearson raised a timely *Apprendi* challenge at sentencing and the holding of *Griffith*, as well as decisions cited therein, suggest that retroactive application of *Booker/Fanfan* is appropriate in Pearson's case.

As a preliminary point, it cannot be overstated that defendant Pearson stands apart from other *habeas* petitioners—as well as other defendants whose appeals are not yet final—insofar as it is undisputed that he raised a timely, albeit unsuccessful, *Apprendi* argument during his sentencing. At his December 20, 2002 sentencing, Pearson explicitly urged the trial court to adopt, in accordance with *Apprendi*, a "reasonable doubt" burden of proof with respect to any sentencing enhancements. App. 50a-51a. Instead the trial court rejected the appli-

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[2] The "clear break" phraseology refers to the *Griffith* Court's adherence to the "clear break" exception, whereby a new rule that constituted "an explicit and substantial break with prior precedent" could not be instituted retroactively. 479 U.S. at 714-15. In the *Griffith* case, the Court cited the example of its ruling in *Allen v. Hardy*, 478 U.S. 255 (1986), that *Batson v. Kentucky*, 476 U.S. 79 (1986), was not to be retroactively applied on federal *habeas* review because *Batson*, which established that the prosecution's use of peremptory challenges to strike members of the defendant's race from the jury venire was unconstitutional, explicitly overruled *Swain v. Alabama*, 380 U.S. 202 (1965). Here, in *Booker/Fanfan*, there is no such issue of overruling precedent as the Court deems its opinion a "culminati[on]" and "reaffirm[ance]" of *Apprendi*. *See* Slip Opinion, at 12, 20 (Stevens, J.)

cation, suggested the Seventh Circuit "is not doing that" and invited a "more wiser and bolder judge [to] take that lead." App. 52a. This Court, the final authority on this issue, has now ruled that the argument advanced by Pearson and rejected by the trial court was, in fact, mandated by the Sixth Amendment. As Justice Breyer writes above, the fact that Pearson raised a timely challenge to the sentencing judge's "preponderance of the evidence" standard deserves special consideration when assessing whether retroactivity is appropriate.

As *Griffith* and the cases cited therein also make clear, the Court's overriding concern in assessing whether retroactivity of a constitutional law is proper is to guarantee that similarly situated defendants are treated equally. Here, sustaining Pearson's present sentence would not only continue to put him on different footing from like former Exide officers who were convicted and sentenced in this matter, but from other, totally unrelated defendants convicted in the Seventh Circuit *at the precise time* of Pearson's conviction. In *Griffith*, the Court recognized, albeit in the context of direct review, that

> it is the nature of judicial review that precludes us from '[s]imply fishing one case from the stream of appellate review, using it as a vehicle for pronouncing new constitutional standards, and then permitting a stream of similar cases subsequently to flow by unaffected by that new rule.'

479 U.S. at 323 (quoting *Mackey v. United States*, 401 U.S. 667, 679 (1971); citing *United States v. Johnson*, 457 U.S. 537, 546-47 (1982)). The *Griffith* Court further condemned the patent inequity of a "one chance beneficiary—the lucky individual whose case was chosen as the occasion for announcing the new principle—enjoy[ing] retroactive application, while others similarly situated have their claims adjudicated under the old doc-

trine." 479 U.S. at 327 (quoting *Hankerson v. North Carolina*, 432 U.S. 233, 247 (1977)(Powell, J., concurring)). And yet that is precisely what would occur if Pearson is merely lumped with all other federal *habeas* litigants, the vast majority of whom did not assert timely *Apprendi* objections.

In his original appeal to the Seventh Circuit in 2003, Pearson unsuccessfully argued that the trial court exercised disparate sentencing in sentencing two other equally, if not arguably more, culpable participants in the underlying Exide wire fraud case—namely, former Executive Vice President Joseph Calio and former Chief Financial Officer Alan Gaulthier—to just six months home arrest and five months imprisonment followed by five months home confinement, respectively, pursuant to plea agreements, as contrasted with Pearson's sentence of 64 months following a three-month trial.[3] Importantly, in the totally unrelated matter of *United States v. Shearer*, 379 F.3d 453 (7th Cir. 2004), the Seventh Circuit, based on its *Booker* decision (now affirmed by this Court), vacated and remanded the sentence of a defendant who was convicted ***on the very same day*** (June 20, 2002) as Pearson. 379 F.3d at 454. Surely this Court did not intend that two defendants, convicted on the very

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[3] Indeed, as noted in Pearson's original appeal, at Pearson's sentencing, the trial court, in assessing Calio's credibility, commented: "The key to Mr. Pearson's role in this case obviously does boil down in large part to Mr. Calio, unfortunately. And if I put the two side-by-side, I more often than not would probably believe Mr. Pearson, if I ever had a conversation with him. I don't know that I ever have had. But a lot of what Mr. Calio said I probably would choose not to believe." *See* Pearson Sentencing Transcript dated December 20, 2002, at App. 53a. Notwithstanding, the court acknowledged accepting Calio's account of a critically disputed oral exchange between he and Pearson using a "by a preponderance of the evidence" standard. *Id.*

same day, should receive disparate sentencing treatment based on the fact that one defendant (Pearson)—who raised a timely *Apprendi* challenge no less—had a more accelerated appeal than the other (Shearer).[4] As the Supreme Court declared in *United States v. Johnson*:

> This Court has no power to speed up or slow down the appellate process in the many tribunals throughout the country to ensure similar treatment of similarly situated defendants. The Court does, however, have the power to eliminate the obvious unfairness that results when it gives only the most conveniently situated defendant the retrospective benefit of a newly declared rule.

457 U.S. at 556 n.17. As the *Johnson* majority additionally voiced: "The dissent argues that 'we long ago resolved the problem of the appearance of inequity that arises whenever we limit the retroactive reach of a new principle of law.' . . . until now this Court has not 'resolved' this problem so much as it has chosen to tolerate it. The time for toleration has come to an end." *Id.* at n.16.

In the *Hankerson* decision, which analogously found that a new rule of constitutional law requiring that all elements of a criminal offense be established beyond a reasonable doubt and invalidating presumptions that shifted the proving of such elements to the defendant *should be given retroactive application*, the Supreme Court stated:

> Where the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function . . . , the new rule has been given complete retroac-

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[4] The Seventh Circuit's opinion does not indicate whether Shearer raised an *Apprendi* objection at sentencing.

> tive effect.[5] Neither good-faith reliance by state or federal authorities on prior constitutional law or accepted practice, nor severe impact on the administration of justice has sufficed to require prospective application in these circumstances.' . . .
>
> '[*In re*] *Winship*[, 407 U.S. 203 (1970)] expressly held that **the reasonable-doubt standard 'is a prime instrument for reducing the risk of convictions resting on factual error**. The standard provides concrete substance for the presumption of innocence that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law' . . . . To this end, **the reasonable-doubt standard is indispensable, for it 'impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue**. . . .
>
> 'Plainly, then, **the major purpose of the constitutional standard of proof beyond a reasonable doubt** announced in *Winship* **was to overcome an aspect of a criminal trial that substantially impairs the truth-finding function, and *Winship* is thus to be given complete retroactive effect**.'

432 U.S. at 241 (citations omitted)(emphasis added). Such a "bedrock 'axiomatic and elementary' principle" as the reasonable-doubt standard is precisely the type of "watershed rules of criminal procedure" that the

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[5] *See also Allen v. Hardy*, 478 U.S. 255, 259 (1986)(retroactivity appropriate where decision announcing new standard "goes to the heart of the truthfinding function" and "is designed to enhance the accuracy of criminal trials"); *United States v. Johnson*, 457 U.S. 537, 544 (1982)("the Court has regularly given complete retroactive effect to new constitutional rules whose major purpose 'is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function' . . .").

Supreme Court has designated as warranting retroactivity for *habeas* petitioners. *See Teague v. Lane*, 489 U.S. 288, 311, 312 (1989). As the *Hankerson* decision unequivocally found: failure to properly apply the reasonable-doubt standard "substantially impairs the truth-finding function," which, in turn, triggers retroactive application of a new, responsive constitutional doctrine.

The Seventh Circuit in *United States v. Pree*, 2004 U.S. App. LEXIS 19252, *48 (7th Cir. Sept. 14, 2004), acknowledges protecting the constitutional rights of appellants who ***never*** asserted an *Apprendi/Blakely* challenge:

> [Defendant] does not address to this court, nor can we find evidence in the record to indicate, that she addressed before the district court the constitutionality of her sentencing enhancement. In light of the sea change in federal sentencing law wrought by *Blakely* and *Booker*, we think it appropriate to take note of the possibility of an unconstitutional sentencing enhancement. *See United States v. Seacott*, 15 F.3d 1380, 1383 (7th Cir. 1994). Given the precedent in this circuit prior to *Blakely*, we think it would be unfair to characterize [defendant] as having waived a challenge to the validity of her sentencing enhancement.[6]

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[6] *See also United States v. Messino*, 382 F.3d 704, 714-15 (7th Cir. 2004)(Easterbrook, Circuit Judge, dissenting in part):

> [T]he United States contended that the defendants had not adequately preserved an argument based on *Blakely v. Washington*, — U.S. —, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), and that our review therefore is limited to a search for plain error. All three members of the panel disagree with that position. Both [defendants] advanced in their opening briefs arguments based on *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), which led to *Blakely* and *Booker*. True,

What message would it send and what goal would be achieved, in relation to the Supreme Court's overriding concern that similarly situated defendants be sentenced equally, if Pearson, who raised a timely *Apprendi* objection, is denied the same constitutional protection that was accorded to other defendants who did not raise an *Apprendi/Blakely* objection?

The *Booker/Fanfan* decision confirms that Pearson, as a defendant whose sentence was substantially enhanced by factual findings not determined beyond a reasonable doubt or by a jury, was deprived certain fundamental Sixth Amendment rights. The record is clear that Pearson asserted, and was improperly denied, such constitutional rights under *Apprendi* at the time of his sentencing—and is presently serving an *additional* 4-plus years as a result. The Supreme Court's mandate is equally unmistakable that when a defendant is denied a constitutionally prescribed reasonable-doubt burden of proof, so as to impair the trial's fact-finding function, any new, consequent constitutional principle is deemed a "watershed rule" requiring retroactive effect.

II. The Supreme Court Has Concluded That the Federal Sentencing Guidelines, As Mandatorily Applied to Pearson, Are a Violation of the Sixth Amendment

Pearson appears before this Court because, as a result of sentencing enhancements predicated on a judge's fact-finding under a "preponderance of the evidence" standard, his two-count conviction for conspiracy to commit wire fraud and wire fraud was elevated from a base 6 offense level to a 26 offense level, and his sentence was

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appellants did not develop these arguments at length in either the district court or their appellate briefs, but the law was so firmly against them that elaboration would have been pointless.

consequently increased from a statutory maximum of 12 months to 64 months.

In its historic decision in *United States v. Booker/Fanfan*, 543 U.S. ___, 125 S.Ct. 738 (2005), the Supreme Court, in view of its prior decisions in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Blakely v. Washington*, 542 U.S. ___, 124 S.Ct. 2531 (2004), came to the inescapable conclusion that the Federal Sentencing Guidelines, if applied mandatorily, violate the Sixth Amendment insofar as "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." 125 S.Ct. at 756; *see also id.*, at 795 (Thomas, J., dissenting in part)("The Constitution prohibits allowing a judge alone to make a finding that raises the sentence beyond the sentence that could have lawfully been imposed by reference to facts found by the jury or admitted by the defendant"). Hence, by virtue of Pearson's sentencing judge making significant factual findings under a preponderance-of-the-evidence standard that resulted in extending his sentence an additional 4-plus years in violation of the Sixth Amendment, Pearson has remained incarcerated through unconstitutional means for more than one year.

In articulating its rationale for deeming the Federal Sentencing Guidelines unconstitutional, at least as applied mandatorily as in Pearson's case, this Court recounted its recent holdings in *Jones v. United States*, 526 U.S. 227 (1999), *Apprendi*, *Ring v. Arizona*, 536 U.S. 584 (2002) and *Blakely*, Sixth Amendment analysis that bears summarizing, in part, here. In *Jones*, the Court originally established a " 'rule requiring jury determination of facts that raise a sentencing ceiling' in state

and federal sentencing guideline systems." 125 S.Ct. at 748 (quoting *Jones*, 526 U.S. at 251 n.11). The following year in *Apprendi*, the Court expounded that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 125 S.Ct. at 748 (quoting *Apprendi*, 530 U.S. at 490). Thereafter, in *Ring*, the Court even more simply stated that "[i]f a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt." 125 S.Ct. at 749 (quoting *Ring*, 536 U.S. at 602). The *Ring* Court further espoused that "the characterization of a fact or circumstance as an 'element' or a 'sentencing factor' is not determinative of the question 'who decides,' judge or jury." 125 S.Ct. at 749 (quoting *Ring*, 536 U.S. at 605). Finally, last year in *Blakely*, the Court clarified that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." 125 S.Ct. at 749 (quoting *Blakely*, 124 S.Ct. at 2537)(emphasis in original).

In discussing the evolutionary process by which sentencing enhancements became exponentially greater while the jury's role in this "new sentencing regime" became correspondingly smaller, the *Booker/Fanfan* Court concluded that

> [I]t is the new circumstances, not a tradition or practice that the new circumstances have superceded, that have led us to the answer first considered in *Jones* and developed in *Apprendi* and subsequent cases culminating with this one. It is an answer not motivated by Sixth Amendment for-

> malism, but by the need to preserve Sixth Amendment substance.

125 S.Ct. at 752. The Court reiterated that this fundamental constitutional protection is steeped in centuries-old common law:

> More important than the language used in our holding in *Apprendi* are the principles we sought to vindicate. Those principles are unquestionably applicable to the Guidelines. They are not the product of recent innovations in our jurisprudence, but rather have their genesis in the ideals our constitutional tradition assimilated from the common law.

Id. at 753 (citing *Jones*, 526 U.S. at 244-48). Hence, given the Court's characterization of its *Booker/Fanfan* holding as arising from "new circumstances, not a tradition or practice that the new circumstances have superceded" and as vindicating "principles . . . not the product of recent innovations in our jurisprudence," there can be no doubt that this decision constitutes one of the "small set of 'watershed rules of criminal procedure' " which "improve[s] the pre-existing fact-finding procedures" and therefore mandates retroactive application under *Teague v. Lane*, 489 U.S. 288, 311, 312 (1989).

III. Because *Blakely* and *Booker/Fanfan* Establish a Watershed Rule of Criminal Procedure, Its Holding Must Be Applied Retroactively to Petitioner Pearson

Pearson submits that by virtue of the fact that *Blakely*, and by extension *Booker/Fanfan*,[7] created a "new rule"

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[7] "*Blakely* reserved decision about the status of the federal Sentencing Guidelines, . . . so *Booker* itself represents the establishment of a new rule about the federal system." *McReynolds*, 397 F.3d at 481.

of criminal procedure that undermined the fundamental fairness of his sentence, it must be applied retroactively to his sentence. "[O]nce a new rule is applied to the defendant in the case announcing the rule, evenhanded justice requires that it be applied retroactively to all who are similarly situated."[8] *Teague*, 489 U.S. at 300. Indeed, "the harm caused by the failure to treat similarly situated defendants alike cannot be exaggerated: such inequitable treatment 'hardly comports with the ideal of 'administration of justice with an even hand.' " *Id.* at 315 (citations omitted). Under *Teague*, a new rule shall be applied retroactively "if it places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe' ", or "if it requires the observance of 'those procedures that are 'implicit in the concept of ordered liberty'." *Id.* at 307, 310 (quoting *Mackey v. United States*, 401 U.S. 667, 692, 693 (1971)(Harlan, J., concurring in part, dissenting in part)).

Because retroactively applying constitutional rules not in existence at the time of a conviction "undermines the principle of finality which is essential to the operation of our criminal justice system",[9] *Teague*, 489 U.S. at 309,

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[8] The *Teague* Court deemed its new standards superior to that of the retroactivity standard established in *Linkletter v. Walker*, 381 U.S. 618 (1965), which led to "unfortunate disparity in the treatment of similarly situated defendants on collateral review." 489 U.S. at 305.

[9] Notwithstanding, "[t]he fact that life and liberty are at stake in criminal prosecutions 'shows . . . that 'conventional notions of finality' should not have as much place in criminal as in civil litigation.' " *Teague*, 489 U.S. at 309 (citation omitted)(emphasis in original); *see also id.* at 328 (Brennan, J., dissenting)("conventional notions of finality in criminal litigation cannot be permitted to defeat the manifest federal policy that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary federal judicial review")(quoting *Fay v. Noia*, 372 U.S. 391, 424 (1963)).

retroactivity has historically been applied to "only a small set of 'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." *Schriro v. Summerlin*, 124 S.Ct. 2519, 2523 (2004)(citing *Saffle v. Parks*, 494 U.S. 484, 495 (1990)(quoting *Teague*, 489 U.S. at 311)). Such "watershed rules of criminal procedure" emerge as a consequence of

> time and growth in social capacity, as well as judicial perceptions of what we can rightly demand of the adjudicatory process, will properly alter our understanding of the *bedrock procedural elements* that must be found to vitiate the fairness of a particular conviction.

Teague, 489 U.S. at 311 (quoting *Mackey*, 401 U.S. at 693-94 (Harlan, J.))(emphasis in original). From this, Justice Harlan concluded that "all 'new' constitutional rules which significantly improve the pre-existing fact-finding procedures are to be retroactively applied on habeas." *Teague*, 489 U.S. at 312 (quoting *Desist v. United States*, 394 U.S. 244, 262 (1969)(Harlan, J., dissenting).

Be it a "sea change"[10] or a "new constitutional rule", *Blakely* established that the "right [of a jury to make

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[10] As the Ninth Circuit stated in *United States v. Ameline*, 376 F.3d 967, 973 (9th Cir. 2004), *Blakely* and its progeny has "worked a sea change in the body of sentencing law." *See also United States v. Pree*, 2004 U.S. App. LEXIS 19252, *48 (7th Cir. Sept. 14, 2004)("In light of the sea change in federal sentencing law wrought by *Blakely* and *Booker* . . ."); *United States v. Reyes-Acosta*, 2004 U.S. Dist. LEXIS 17635 (N.D. Ill. Sept. 2, 2004), *6 ("*Blakely* will override the legislature's preference that defendants be sentenced by judges and, at least, partially restore the jury's role in sentencing. The use of the jury in this way would represent a sea change in the federal criminal jurisprudence").

findings of fact relative to the imposition of a penalty] is no mere procedural formality, but a fundamental reservation of power in our constitutional structure." *Blakely*, 124 S.Ct. at 2539. Such a radical departure from pre-existing fact-finding procedures—and speaking to a core, fundamental right—must be considered a *watershed rule*. True, in *Schriro*, *supra*, Justice Scalia, writing for a 5-4 majority, declined to find that the holding in *Ring v. Arizona*, 536 U.S. 584 (2002)—which found that a sentencing judge may not determine an aggravating factor necessary for the imposition of the death penalty—announced a watershed rule that necessitated retroactive application, since "reasonable minds continue to disagree over whether juries are better factfinders *at all*" and hence precluded the conclusion that "judicial factfinding *seriously* diminishes accuracy" as to produce an "impermissibly large risk of injustice." 124 S.Ct. at 2525 (citations omitted)(emphasis in original). Yet those opinions are at odds with the holding of *Blakely*, wherein Justice Scalia, again writing for a 5-4 majority, observed that "[o]ur Constitution and the common-law traditions it entrenches . . . do not admit the contention that facts are better discovered by judicial inquisition than by adversarial testing before a judge" (124 S.Ct. at 2543) and admonished that sentencing should not be dictated "on facts extracted after trial from a report compiled by a probation officer who the judge thinks more likely got it right than got it wrong." *Id.* at 2542. *See also id.* at 2540 ("the very reason the Framers put a jury-trial guarantee in the Constitution is that they were unwilling to trust [judges' intuitive sense of how far is *too far*]")(emphasis in original); *Ring*, 536 U.S. at 610 (Scalia, ~~J.,~~ concurring)("I believe that the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives—whether the

statute calls them elements of the offense, sentencing factors, or Mary Jane—must be found by the jury beyond a reasonable doubt").

Similarly, the Seventh Circuit erred when it capriciously held that *Schriro* "is all but conclusive" on the issue of retroactive application of *Booker*.[11] *See McReynolds v. United States*, 397 F.3d 479, 480 (7th Cir. 2005). Indeed, though acknowledging that *Booker/Fanfan* announced a new rule of criminal procedure, the Seventh Circuit makes the incredible claim that

> *Booker* does not in the end move any decision from judge to jury or change the burden of persuasion. . . . As a practical matter then, petitioners' sentences would be determined in the same way if they were sentenced today; the only change would be the degree of flexibility judges would enjoy in applying the guideline system.

397 F.3d at 481. The *McReynolds* court tellingly does not cite to a single passage of the *Booker/Fanfan* opinion to substantiate the above conclusion, which, parenthetically, is contradicted by Justice Breyer's assessment in the Court's "remedial" opinion that its decision con-

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[11] Other courts have correctly recognized that *Schriro* is not dispositive insofar as

> Schriro addressed only the allocation of factfinding responsibility between the judge and jury. There is a second component to Blakely/Booker that Schriro did not address, namely, that facts used to enhance a sentence, if not admitted, must be proven beyond a reasonable doubt rather than by a preponderance of the evidence.

United States v. Siegelbaum, 2005 WL 196526, *3 (D.Or. January 26, 2005); *see also Rucker v. United States*, 2005 WL 331336, *8 (D.Utah February 10, 2005)(quoting *Siegelbaum*). As the *Rucker* court noted, "*Schriro* did not address this issue because the Arizona statute already required proof beyond a reasonable doubt." *Id.* (quoting *Ring*, 536 U.S. at 597).

stitutes "a constitutional requirement that creates fundamental change." 125 S.Ct. at 758; *see id.*, at 756, 757 (wherein majority refers repeatedly to its "constitutional holding"). Moreover, the *McReynolds* opinion does not indicate whether the defendant in that case, as here, raised a timely *Apprendi* objection at sentencing.[12] Again, Pearson submits that this critical fact distinguishes his appeal from the legions of other *Booker/Fanfan*-based appeals.

The *McReynolds* court also rationalizes its decision by noting that in *Curtis v. United States*, 294 F.3d 841 (7th Cir. 2002), it previously held that *Apprendi* did not apply retroactively, and consequently, this "is equally true of *Booker*." 397 F.3d at 480-81. Interestingly, however, in *Curtis*—decided June 19, 2002, ***the day before*** petitioner Pearson was convicted—the Seventh Circuit recognized that the trial court erred in enhancing the defendant's sentence by making factual finding as to the quantity of distributed drugs since "*Apprendi* establishes that this decision was made by the wrong body (the court) and under the wrong burden of persuasion (a preponderance of the evidence)." 294 F.3d at 842. The *Curtis* court further found that "*Apprendi* . . . identifies a new rule of criminal procedure." *Id.* at 843. Nevertheless, at the time of Pearson's sentencing, some six months after the *Curtis* decision, the trial judge, in rejecting Pearson's application that a "reasonable doubt" burden of proof be applied to any sentencing enhancements, still suggested the Seventh Circuit "is not doing that" and invited a

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[12] Similarly, the only two other Circuit Court decisions to decide *Booker/Fanfan*'s retroactive application to initial § 2255 petitions—*Humphress v. United States*, 2005 WL 433191 (6th Cir. February 25, 2005) and *United States v. Price*, 2005 WL 535361 (10th Cir. March 8, 2005)—also make no reference as to whether the defendants raised timely *Apprendi* objections at time of sentencing.

"more wiser and bolder judge [to] take that lead." App. 52a.

During last year's Supreme Court oral argument in *Booker/Fanfan*, Justice Stevens certainly allowed for the possibility that the Court's ultimate decision would allow for retroactive application, stating:

> I had been under the impression, perhaps erroneous, that in fact the number of unconstitutional departures if one follows Apprendi as being the constitutional rule, is actually a small percentage of the total, and if it should follow that only three, four, five, six percent of the sentences ***that have heretofore been imposed*** or will be imposed in the future ***would be unconstitutional***, that's a pretty weak reason for saying the whole [federal sentencing guidelines] is unconstitutional on its face, or even in one provision of the statute. It seems to me you just say, 'Oh, okay, you can't impose those sentences in those three percent of the cases.' I don't know why that's a departure from our prior practice.

App. 71a-72a (emphasis added). Likewise, Justice Scalia, who authored the *Blakely* opinion, also did not reject the possibility of *Blakely* applying retroactively during the *Booker/Fanfan* oral argument:

> SOLICITOR GENERAL PAUL CLEMENT: . . . But I think any way you slice this, [the *Blakely* decision] is going to have a tremendous impact on the reality of criminal sentencing in the Federal system.
>
> JUSTICE SCALIA: Well, as to the past. I mean, it may have a significant one-shot impact with respect to cases that were decided without Blakely in mind. But for the future, I, I just don't know agree with you that changes could make some reduction. . . .

App. 70a-71a.

Furthermore, in *Simpson v. United States*, the Seventh Circuit observed that *Blakely* did not expressly foreclose retroactive application. 376 F.3d 679, 682 (7th Cir. 2004)("[s]hould the Supreme Court announce that *Blakely* applies retroactively to cases on collateral review . . . ."); *see also United States v. Reyes-Acosta*, 2004 U.S. Dist. LEXIS 17635, *9 (N.D. Ill. Sept. 2, 2004)(finding that "the Blakely rules may be retroactively applied" where defendant has pled guilty but not been sentenced); *Shell v. United States*, 2004 WL 1899013, *6 (N.D. Ill. August 16, 2004) ("*Simpson* not[ed] that the Supreme Court has yet to decide whether or not *Blakely* applies to habeas petitions"). Other federal courts have also demonstrated a willingness to entertain *Booker/Fanfan* and *Blakely* applications on a retroactive basis. *See, e.g., United States v. Siegelbaum*, 2005 WL 196526, *4 (D.Or. January 26, 2005)(suggesting that initial § 2255 petitions are entitled to *Blakely/Booker* retroactive application relative to a defendant "serving a sentence enhanced on the basis of ***contested facts*** that were not found to be true [by a jury] beyond a reasonable doubt, nor admitted by the defendant")(emphasis in original); *Morales v. United States*, 2004 WL 1701037, *2 (D.Minn. July 30, 2004)(in setting briefing schedule, court held that"[b]ased upon the Supreme Court's recent ruling in *Blakely v. Washington*, . . . and the Eighth Circuit's interpretation of *Blakely* as rendering the Guidelines unconstitutional, . . . the issues of the potential retroactivity and impact of these opinions on Petitioner's particular circumstances warrant further exploration"). Additionally, in *United States v. Burton*, 2004 WL 1813105, *6 (E.D. Pa. July 21, 2004), the trial court concluded that "[t]he Supreme Court has not ruled whether *Apprendi* (and *Blakely* on which it was based) applies retroactively; thus this is an open ques-

tion as well." The *Burton* court, having "assume[d] *arguendo* that *Blakely* applies to the Federal Sentencing Guidelines and applies retroactively in habeas corpus proceedings", proceeded to reconsider the defendant's sentencing under an *Apprendi/Blakely* analysis.[13] *Id.* at *7-8.

Notwithstanding the *Schriro* Court's reluctance to retroactively apply the *Ring* holding, *Booker/Fanfan's* and *Blakely*'s strides to end indeterminate sentencing is distinguishable from *Ring*'s concern in protecting defendants from the imposition of capital sentences by arbitrary means. In *Blakely*, by way of example, Justice Scalia observed:

> Of course indeterminate schemes involve judicial factfinding in that a judge . . . may implicitly rule on those facts he deems important to the exercise of his sentencing discretion. But the facts do not pertain to whether the defendant has a legal *right* to a lesser sentence—and that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned. In a system that says the judge may punish burglary with 10 to 40 years, every burglar knows he is risking 40 years in jail. In a system that punishes burglary with a 10-year sentence, with another 30 added for use of a gun, the burglar who enters a home unarmed is *entitled* to no more than a 10-year sentence—and by reason of the Sixth Amendment the facts bearing upon that entitlement must be found by a jury.

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[13] In *Burton*, the court reaffirmed the sentence in view of Blakely because the petitioner's guideline range was "based solely on facts admitted to by defendant" at his plea hearing. Here, Pearson has not entered a guilty plea, nor stipulated to facts in conjunction therewith, which would, perforce, validate his sentence.

124 S.Ct. at 2540 (emphasis in original). *See also Blakely*, 124 S.Ct. at 2549 (O'Connor, J., dissenting)(notwithstanding "the fact that we hold in *Schriro v. Summerlin* that *Ring* (and *a fortiori Apprendi*) does not apply retroactively on habeas review, all criminal sentences imposed under the federal and state guidelines since *Apprendi* was decided in 2000 arguably remain open to collateral attack")(internal citations omitted). Hence, in *Ring*, the defendant understands the risk that the commission of murder could result in statutory imposition of the death penalty.[14] In the case of appellant Pearson, however, where sentencing is determined on such subjective matters as "relevant conduct", "role in the offense" and the "amount of loss" attributable to him, his fate is left totally to the discretion of the sentencing judge as to what wide-ranging actions qualify as such characterizations.[15]

To even suggest that the *Blakely* decision (and by extension, *Booker/Fanfan*), which prompted the Seventh Circuit and other Circuit Courts to essentially render the Guidelines unconstitutional, is not a watershed rule of criminal procedure is disingenuous and ignores a colossal change in American jurisprudence. The Circuit courts' widespread post-*Blakely* practice of vacating sentences rendered under the Guidelines and remanding defendants for re-sentencing bears witness to this. Such

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[14] In *Ring*, Arizona's first-degree murder statute prescribed that the offense "is punishable by death or life imprisonment as provided by § 13-703." 536 U.S. at 592.

[15] The concept of "relevant conduct" compounds the fatal constitutional deficiencies of the Guidelines even further. As the court pointed out in *United States v. Shonubi*, 103 F.3d 1085, 1095 (2d Cir. 1997), "evidence tending to prove 'relevant conduct' is not merely taken into consideration at sentencing, it *determines* sentencing (subject only to departure authority)". (emphasis in original).

a fundamental change in the process—and establishment of a constitutional right—by which fact-finding can only be conducted by a jury at the sentencing stage for *any* form of punishment is very clearly a procedure, as contemplated by Justice Harlan and adopted in *Teague*, "implicit in the concept of ordered liberty." As such, fundamental fairness and evenhanded justice requires that this new rule be applied retroactively to petitioner Pearson.

CONCLUSION

Based on the foregoing arguments, the granting of *certiorari* is warranted and the decision of the Seventh Circuit should be reversed insofar as the its decision in *McReynolds v. United States*, 397 F.3d 479, 480 (7th Cir. 2005), is inconsistent with *Booker/Fan* and this Court's earlier precedent.

Respectfully submitted,

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